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Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA

v.

ROBERT LEO MORAN,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a Court of Appeal may reinstate that portion of an indictment which had been dismissed by the trial court, because of unjustified pre-indictment delay, on the ground that the trial court did not state that the delay was the "fault" of the government although the record clearly showed that to be so.

2. Whether a Court of Appeal may abandon the limits of the "clearly erroneous" standard of review and substitute its own findings of fact in order to conclude that the government was not at fault for an unjustified pre-trial delay.

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Robert Leo Moran, the defendant in the proceeding below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, A-1 through A-14) is reported at 1759 F.2d 777. A rehearing was denied. (App. B, infra, A-15 through A-17) The opinion of the District Court is not reported. (App. C, infra, A-18 et seq.)

JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1985. A petition for rehearing was denied on September 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right to a speedy trial.

STATEMENT

The petitioner Moran was originally indicted in the District Court in March, 1980, on 13 counts charging him, *inter alia*, with being a conspirator in a marijuana smuggling scheme involving a ship named the *Helena Star*. When the case was called for trial in September, 1980, the government sought a continuance because two of its forty witnesses failed to appear. The defendant objected to the continuance and the motion was denied. The government then moved to dismiss the indictment, clearly declaring that it would re-indict the defendant when it found the two witnesses. The witnesses were arrested in April, 1981 and agreed to testify against petitioner. The government failed to act to reindict the defendant until April 15, 1983.

The reindictment included all the charges of the original indictment but added a single count alleging obstruction of the Internal Revenue Service.

The petitioner's motion to dismiss counts II through XVII (which were all part of the original indictment) was granted by the District Court, which concluded that he had suffered "actual prejudice" which was "the direct result of the government's delay." (A-18) It also found that the delay was "unjustified and excessive" and the government's excuses for the delay "were not sufficient." (A-18)

The Court of Appeals, on May 3, 1985, reversed the dismissal of these counts, on the ground that the District Court had not "expressly found any fault on the part of the government." (A-8) The petition for rehearing en banc was denied. (A-15) It is from the judgment of the Court of Appeals that the petitioner now seeks certiorari from this Court.

REASONS FOR GRANTING THE PETITION

This case presents two important questions concerning the application of the Sixth Amendment guarantee of a speedy trial.

First, the Court of Appeals' opinion impliedly imposing a requirement that the District Court use the word "unjustified" in holding the government at fault for pre-trial delay (in the face of a factual record which explicitly showed lack of justification) seriously misconstrues the requirements imposed by this Court in its previous speedy trial decisions.

Second, the Court of Appeals' substitution of its own findings and conclusions for that of the District Court, on the question of whether the government's delay was justified, violates the limitations of the clearly erroneous standard of review.

The District Court found that the length of the delay between the dismissal of the original indictment against Moran and his subsequent re-indictment, 31 months later, was excessive. The reindictment took place only hours before the expiration of the five-year statute of limitations. Starting the day on which the indictment was dismissed, September 8, 1980, the first seven months of the delay occurred while the government searched for the two witnesses it had allowed to jump bail when they were supposed to be in prison. They were recaptured in April, 1981, and reaffirmed their willingness to testify for the government. Instead of re-indicting Moran promptly, as it had led the District Court to believe it would, the government delayed for another twenty-three months, until the statute of limitations was about to run.

The Court of Appeals attempted to minimize the negligence in the delay between April, 1981 (when the two witnesses were reapprehended) and the reindictment on April 15, 1983, by stating that "... the government had obtained new information from [a witness, Cooke] recently released from federal prison." (A-2) The Court of Appeals was wrong in its recitation of the facts. Cooke was released from state prison in September, 1981, testified briefly in front of the grand jury in October, 1981 and played no further significant role in the investigation. His testimony before the grand jury consisted of alleging that Moran had

been involved in money laundering. The government had been making the same charge, and had been "investigating" that allegation since June, 19[illegible].

The District Court also found that Moran suffered "actual prejudice" because of the "verifiable" loss of witnesses and witness testimony that was available to him in September, 1980 if the case against him had gone to trial then.[1]

The Court of Appeals reversed the dismissal of the 16 counts by the District Court on the sole basis that:

> The District Court characterized the government's delay in this case as "unjustified", but it never expressly found any fault on the part of the government.

(A-8)

The Court of Appeals makes no reference to the finding of the District Court that prejudice was "the direct result of the Government's delay."

The Court of Appeals goes on to declare that:

> Although. . . negligent governmental conduct may form a basis for unconstitutional pre-indictment delay, our cases

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[1] Inexplicably the Court of Appeals attempted to denigrate the import of the findings by the District Court in this regard. It stated, as if it were the basest of claims, that "Moran's assertions of prejudice consist solely of the loss of witness testimony and the impairment of other witness testimony. . ." (A-6) *Cf. Barker v. Wingo*, 407 U.S. 514, 532 (1972); *Klopfer v. North Carolina*, 386 U.S. 132 (1967); *U.S. v. Mays*, 549 F.2d 670 (9th Cir. 1977).

The Court of Appeals merely mentioned, without comment, that one of the missing witnesses was Alvaro Azuero. (A-7) Of all the losses the petitioner suffered Azuero's was clearly the greatest and most prejudicial because it was central to his defense. Azuero, an attorney and former mayor of Cartegena, Colombia, was prepared in September 1980 to contradict the government's key witnesses as to the ownership and purpose of the monies placed in the off-shore banks, and corporations formed to handle them. He was prepared to testify that it was his lawful money. And, he was prepared to testify that he had repeatedly told Moran that.

clearly require some showing of governmental culpability to prove deprivation of due process.

(A-8)

The *sub silentio* conclusion of the Court of Appeals that there was no government culpability attached to the prejudicial delays is baseless and erroneous. It wholly ignores the extensive record that the District Court had before it when it dismissed the 16 counts. The Court of Appeals overreached the limits of its scope of review in order to improperly substitute its judgment on the facts for that of the lower court.

It is true that the District Court never used the precise words "I find that the government was negligent, and that it was culpable for its own negligence as the result of its own culpability." These appear to be the talismanic words that the Court of Appeals insists must be spoken. There is no authority for the Court of Appeals to impose such a narrow requirement, especially where it is clear beyond peradventure of a doubt that this is exactly what the record showed to the District Court.

The District Court stated that the "actual prejudice" to Moran was "the direct result of the government's delay." And, the record is without dispute as to the government's grossly negligent role in failing to produce its two key witnesses at trial. The fault, by reason and by the record, must be that of the government. Yet the Court of Appeals insists that the decision of the lower court is fatally deficient.

The statements by the District Court as to its findings of responsibility for the delay, were made orally, at the conclusion of hours of legal argument on the motions to dismiss. The District Court was not delivering an oral judgment in the manner of English appellate judges. Rather, the Court's conclusions were contained in a few specific conclusions it articulated when it ruled from the bench.

The Court of Appeals erroneously failed to give any import to the clear meaning of the findings of the lower court, which were:

1. Moran has suffered "actual prejudice" because of the government's delay in bringing him to trial;

2. The prejudice suffered by Moran was the "verifiable loss of witnesses and witness testimony which would have been available if the trial had gone forward in September, 1980";

3. That "actual prejudice" was "the direct result of the government's delay";

4. The delay was "unjustified and excessive,";

5. The reasons for the government's delay "were not sufficient";

6. The effect of the delay was to deprive Moran of due process under the Fifth Amendment.

A. The Government's Culpability for the Delay Was Clearly Established by the Record

A summary of the uncontroverted facts in the District Court record shows that:

(1) The original events that formed the basis for the prosecution of Moran (the *Helena Star* smuggling episode) took place in April, 1978. The two key government witnesses (Hale and Victorson) were indicted in June, 1978 and shortly thereafter agreed to testify against Moran. Nevertheless, Moran was not originally indicted until March, 1980.

(2) Moran appeared and announced ready for trial on September 8, 1980, but the government moved for a continuance because Victorson and Hale, two of its forty witnesses, were missing. The continuance was denied because of the uncertainty as to how long it would take the government to find the missing witnesses. The government then moved for the dismissal of the indictment under Rule 48(a), declaring it would find the two witnesses within 60 days and then go to trial. In light of that representation, the Court granted the motion to dismiss, preserving the government's right to re-indict when the two witnesses were apprehended. The motion was granted with the express understanding that any re-indictment would be reviewed by the District Court to determine "whether this defendant's right to a speedy trial had been violated or for any other reason the Indictment should be dismissed."

The missing witnesses had been convicted in September 1978 for their roles as the organizers of the *Helena Star* smuggling scheme. Even by the time of their trials they had agreed to testify against Moran, and their subsequent sentences were part of a plea bargain already struck with the government. Although each had been sentenced to five years imprisonment, they were allowed to remain free on bail pending appeal of their convictions. The government did not oppose the bail. By September 1979, the Court of Appeals had upheld the convictions. However, pursuant to their plea bargain with the government, Victorson and Hale were allowed to remain at liberty on their original bail pending further attempts at appellate review. Their appellate remedies were, in practicality, exhausted in May, 1980, and with finality on July 2, 1980. Nevertheless, the government did not take Victorson and Hale into custody to commence serving their sentences. Instead the government elected to have these two witnesses remain at liberty pending the trial of Moran in September, 1980.

In August, 1980, the government attempted to contact Victorson and Hale in preparation for the trial. They could not be reached by telephone, even though telephone availability had been required as a condition of bail. The prosecutor then attempted to have subpoenas served on them, but government agents were prevented by guards from entering the exclusive residential estate of the witnesses. The government finally moved for and obtained material witness warrants for the arrest of Victorson and Hale. The DEA, supported by the local sheriff, a helicopter and ground support forces, penetrated the residential security armed with warrants.

The two witnesses then spoke with the United States Attorney by phone and "convinced" him that it was unnecessary to arrest them. They simply gave their verbal assurances that they would appear to testify merely pursuant to a subpoena.

However, the witnesses did not appear for Moran's trial. Instead they fled the United States.

Victorson and Hale were captured seven months later, in April, 1981. They reaffirmed their willingness to testify against Moran. However, no re-indictment of Moran was forthcoming. As a

result of their cooperation, the government declined to prosecute their witnesses for bail jumping. The government also agreed not to seek forfeiture of the $270,000 bail of the two witnesses, and Hale's cash bail deposit was returned to him.

3) Given these facts it must be clear in all regards, other than in the precise words uttered briefly from the bench by the District Court, that the lower court had concluded that the government was "at fault" for the delay. The failure of the witnesses to appear was not the result of innocent or accidental events. It was from start to finish the result of conscious decisions which make the government culpable in all regards.

Who else but the government was "at fault" for not having the two principal, convicted, sentenced witnesses at trial. It was the government that consciously and recklessly allowed them to remain on bail after every one of their appellate rights, real and illusory (including petitioning the Supreme Court for certiorari) had been exhausted.

Who else but the government was "at fault" for allowing their witnesses to remain on bail after they breached their bail conditions by making themselves unavailable to the government by telephone contact.

Who else but the government was "at fault" for not having their witnesses in custody and at trial, even after the witnesses had made themselves inaccessible to the government by barricading themselves behind walls and security guards at their estate.

Who else but the government was "at fault" when the prosecutor blithefully agreed to allow his witnesses to remain at large, only under subpoena, after material witness warrants had been served on them.

From first to last the record before the District Court was replete with a series of calculated reckless acts of extraordinary negligence by the prosecutors which led to the ultimate unavailability of the government's witnesses on trial day on September 8, 1980.

If the oral statements of the District Court are in fact deficient in that they did not include the words, "fault on the part of the government", it is a deficiency that is cleared up by the record.

B. If There Was any Lack of Clarity in the Oral Findings of the District Court, the Matter Should Have Been Remanded for a Written Statement by That Court, Rather Than the Court of Appeals Substituting its View of the Facts in the Record for That of the Lower Court

At the very least, the Court of Appeals should have, as was requested by the appellant, remanded the matter of the dismissal of the 16 counts to the District Court for a specific statement of whether its oral statements meant that it had found the government "at fault" for the delays in this case.

Rather, the Court of Appeals engaged in unseemly haste to substitute its judgment on the issue for that of the District Judge who had dealt with this case for five years. The Court of Appeals gives tepid obeisance in the direction of the restraint imposed upon it by its limited power of review—review only for clearly erroneous factual findings. (See A-6.) But, the Court of Appeals then quickly freed itself from these constraints by claiming error in the District Court's failure to use the magic phrase, "the government was at fault."

What makes the decision of the Court of Appeals on such grounds so disturbing and appropriate for review by this Court are the following observations:

1. This is one of the rare cases to come before the Court of Appeals, in which the District Court found the existence of actual prejudice from delay by the government, and granted a motion to dismiss.

2. That in all the reported cases in the Courts of Appeals in which defendants have appealed the refusal of a lower court to dismiss for prejudicial delay, those courts have, without exception, rejected the claims and in every instance accorded the greatest of significance and deference to the conclusions of the lower court.

3. That in the instant case the Court of Appeals went to improper lengths to create a reason to justify, exceeding the scope of its review, the facts in the record, rather than deferring to a five-year long review by the lower court.

4. The Court of Appeals placed an unparalleled premium on brief oral comments made from the bench over the substance of what the lower court clearly found.

5. And, the Court of Appeals placed talismanic importance on the need for the lower court to have used the words "the government was at fault," despite the statement that the prejudice "was the direct result of the government's delay."

CONCLUSION

For all of the foregoing reasons the Petition for Certiorari should be granted.

DATED: November 15, 1985

Respectfully submitted,

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and with him
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/s/
Charles O. Morgan, Jr.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 83-1295, 83-3101
D.C.## CR 83-461-1-DSV
CR 78-123-1-DSV

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ROBERT LEO MORAN,
Defendant-Appellant.

OPINION

Appeal from the United States District Court
for the Western District of Washington
Honorable Donald S. Voorhees, Presiding
Argued and Submitted January 16, 1985—Seattle, WA

Before: WRIGHT and TANG, Circuit Judges, and
CROCKER*, District Judge.

TANG, Circuit Judge:

Robert Leo Moran was convicted of conspiring to defraud the I.R.S. by laundering funds from the sale of narcotics, and was sentenced to 18 months in prison and fined $10,000 on November 18, 1983. Moran had been indicted on seventeen counts, but the district court dismissed sixteen counts before trial on the basis that pre-indictment delay violated Moran's due process rights. The government appeals the order dismissing the sixteen counts, asserting that Moran's due process rights were not violated by

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* Honorable Myron Donovan Crocker, Senior United States District Judge for the Eastern District of California, sitting by designation.

investigative delay. Moran appeals his conviction, asserting that the remaining count should have been dismissed and he also makes several other assertions of error. We reverse the dismissal of Counts II-XVII, and affirm Moran's conviction on Count I.

FACTS

On March 11, 1980, Moran was first indicted for his alleged role in the conspiracy to import marihuana in the Helena Star case.[1] Victorson and Hale, the government's two main witnesses against Moran, were free on bond pending the appeals of their convictions, and failed to appear in time for Moran's scheduled trial date of September 8, 1980. Without the presence of Victorson and Hale, the government declined to proceed with its prosecution; Judge Voorhees dismissed the indictment against Moran without prejudice on September 8, 1980.

Victorson and Hale returned to the United States from Bolivia in April 1981. At this time the government had obtained new information from Guillermo Cooke, a convicted heroin dealer recently released from federal prison. This information was an impetus for an expanded investigation into Moran's money laundering activities that went beyond the Helena Star incident, and involved investigation by Internal Revenue Service agents.

Moran was reindicted on April 15, 1983, some two years after the return of the key witnesses Victorson and Hale. The new indictment contained the original sixteen counts alleged in 1980, plus the added Count I, which alleged a conspiracy to defraud the Internal Revenue Service by laundering through foreign banks and corporations funds from narcotics smuggling.

Moran moved the district court to dismiss the new indictment as violative of his fifth amendment due process rights because of

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[1] On April 16, 1978, the "Helena Star" was boarded and seized by the U.S. Coast Guard. The vessel contained a large quantity of marihuana, and its foreign Captain and First Mate were convicted of conspiracy and attempt to import marijuana into the United States. *United States v. Rubies*, 612 F.2d 397 (9th Cir. 1979), *cert. denied*, 446 U.S. 940 (1980). U.S. citizens David A. Victorson and Eric A. Hale were convicted as co-conspirators in arranging the marihuana smuggling operation in September 1978.

the pre-indictment delay of two years from the return of Victorson and Hale, over three years from the original indictment, and five years from the alleged criminal acts. On July 14, 1983, the district court dismissed Counts II-XVII of the indictment, leaving only the Count I tax avoidance conspiracy charge for trial.

On October 7, 1983 after a lengthy trial, the jury found Moran guilty of the charge. On November 18, 1983, Judge Voorhees sentenced Moran to 18 months imprisonment and fined him $10,000. Moran is free on bail pending appeal.

Government's Appeal: Dismissal of Counts II-XVII of the Indictment Against Moran.

In its Order of August 22, 1983, the district court concluded that re-indicting Moran resulted in his suffering a deprivation of due process because of pre-indictment delay, and ordered that Counts II-XVII be dismissed. The court found that Moran suffered actual prejudice consisting of the "verifiable inability of the defendant to present witnesses' testimony previously available to him in September of 1980 . . ." Furthermore, the court concluded that the government's delay was excessive, and not sufficiently justified under *United States v. Lovasco*, 431 U.S. 783 (1977), and *United States v. Mays*, 549 F.2d 670 (9th Cir. 1979).

Legal standard for determining if due process is violated by pre-indictment delay.

The Supreme Court and this circuit have established a two-prong test for determining if pre-indictment delay has risen to the level of a denial of due process. The first prong of this test is that the defendant must prove "actual prejudice" occurred from the delay. *Lovasco*, 431 U.S. at 789; *United States v. Mills*, 641 F.2d 785, 788 (9th Cir. 1981), *cert. denied*, 454 U.S. 902 (1981).

The dispute over the applicable legal standard in this case centers around the second prong of the test. The United States asserts that the defendant must prove that the government intentionally delayed the indictment to gain a tactical advantage, or delayed it in reckless disregard of the circumstances indicating an appreciable risk of harm to the defense under *Lovasco* and a series of Ninth Circuit cases. Moran, relying principally upon

United States v. Mays, 549 F.2d 670 (9th Cir. 1970), contends that the second prong of the test requires the court to weigh the length of the delay with the reasons for the delay, and that under this test a showing of negligence is sufficient.

In *Mays*, our court expressly held that after actual prejudice is shown, the length of the pre-indictment delay and the reason for that delay must be weighed to determine if due process has been violated. 549 F.2d at 678. We also expressly acknowledged that delays caused by negligent conduct on the part of the government would be considered in the balancing because the ultimate responsibility for such circumstances must rest with the government rather than the defendant. *Id.* Some of our cases have followed the *Mays* formulation of the balancing test, including consideration of negligent conduct. *See, e.g., United States v. Tornabene*, 687 F.2d 312, 317 (9th Cir. 1982); *United States v. Saunders*, 641 F.2d 659, 665 (9th Cir. 1980), *cert. denied* 452 U.S. 918 (1981); *United States v. Stone*, 633 F.2d 1272 (9th Cir. 1979); *United States v. Valenzuela*, 596 F.2d 824, 827 (9th Cir.), *cert. denied*, 441 U.S. 965 (1979).

The government asserts that certain language from *United States v. Marion*, 404 U.S. 307, 324 (1971) and *Lovasco*, 431 U.S. at 795, n.17, overrules *Mays* and requires that the defendant prove either intentional or reckless conduct on the part of the government. We reject this contention. The language from these two cases merely acknowledges governmental concessions that intentional or reckless conduct would or might be considered violations of the due process clause if actual prejudice had been shown. The *Lovasco* court did not set out intent or recklessness as required standards of fault. In fact, in both the *Marion* and *Lovasco* cases, the Court stated that it "could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions." *Lovasco*, 431 U.S. at 796. The Court further stated

> "[w]e therefore leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases. We simply hold that in this case the lower courts erred in dismissing the indictment."

Id. at 797.

Thus, the government's assertion that *Lovasco* overrules the possibility that due process might be violated upon a negligent delay by the government is not supported by the cited cases. The *Lovasco* court simply held that after proof of prejudice is shown, "the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.* at 790. This is fully consistent with the *Mays* standard.

We do acknowledge that some of our cases following *Lovasco* seem to have adopted intent and recklessness as a requirement for showing a due process deprivation. *See United States v. Burns*, 701 F.2d 840, 842 (9th Cir.) *cert. denied* 103 S.Ct. 3123 (1983); *United States v. Walker*, 601 F.2d 1051, 1056 (9th Cir. 1979).

In *Burns*, the defendant did not show any prejudice from the delay, therefore, the language regarding intent or reckless disregard is merely dictum. 701 F.2d at 842. In *Walker* the court considered expressly whether *Lovasco* overruled *Mays*, and held that the balancing test and results in the *Mays* case were consistent with the *Lovasco* case, 601 F.2d at 1056, n.1, but did not address the question of whether negligent conduct could provide a sufficient basis for a deprivation of due process under the right circumstances.

The determination of whether a pre-indictment delay has violated due process is essentially decided under a balancing test, *Lovasco*, 431 U.S. at 790; *Mays*, 549 F.2d at 677, and we do not find that intent or reckless behavior by the government is an essential ingredient in the mix. If mere negligent conduct by the prosecutors is asserted, then obviously the delay and/or prejudice suffered by the defendant will have to be greater than that in cases where recklessness or intentional governmental conduct is alleged.

After making the balancing determination, a pre-indictment delay will be permissible unless it violates fundamental conceptions of justice which lie at the base of our civil and political institutions. *Lovasco*, 431 U.S. at 790. Furthermore, in this area, the due process clause plays a limited role because primary protection is afforded to defendants by the applicable statute of limitations. *Id.* at 789.

Under the correct legal standard, the district court erred in dismissing Counts II-XVII.

The district court's dismissal of Counts II-XVII based on its determination that a denial of due process occurred because of pre-indictment delay is reviewed under the clearly erroneous standard. *See, e.g., Tornabene*, 687 F.2d at 317; *Mays*, 549 F.2d at 678.

Actual Prejudice

The defendant has a heavy burden to prove that a pre-indictment delay caused actual prejudice: the proof must be definite and not speculative, and the defendant must demonstrate how the loss of a witness and/or evidence is prejudicial to his case. *Mays*, 549 F.2d at 677. *See United States v. Carruth*, 699 F.2d 1017 (9th Cir. 1983) *cert. denied*, 104 S.Ct. 698 (1984). Our cases reflect this heavy burden, as we have often found actual prejudice lacking in the record. *See, e.g., Mills*, 641 F.2d 785; *Stone*, 633 F.2d 1272. Accordingly, although we review the district court's finding of actual prejudice under the clearly erroneous standard, we must keep the defendant's heavy burden in mind.

The district court found expressly that the actual prejudice to Moran consisted of

> "The verifiable inability of the defendant to present witnesses or witness testimony previously available to him in September of 1980 (and subsequently). The witnesses' testimony is detailed in the defendant's moving and reply papers."

Moran's assertions of prejudice consist solely of the loss of witness testimony and the impairment of other witness testimony by the dimming of memory. In *United States v. Pallan*, 571 F.2d 497

(9th Cir.) *cert. denied*, 436 U.S. 911 (1978), we emphasized that protection from lost testimony generally falls solely within the ambit of the statute of limitations. We further questioned whether such lost testimony would ever qualify for the level of prejudice necessary to establish a due process violation, and found that the defendant's claims of lost testimony were speculative, and that no showing was made that the loss of such testimony had actually impaired meaningfully the defendant's ability to defend himself. *Id.* at 500-501.

The essence of Moran's claim of actual prejudice is the loss of five witnesses who were available in September of 1980, but who were not available to testify in 1983. Two of these witnesses, Dr. Mark Becker and Susan Kessler, are witnesses who have subsequently died; three other witnesses, Alvaro Azuero, Captain Roman Rubies and Pedro Vera, are presently out of the country and refused to testify in 1983, but were allegedly available in 1980. We have serious doubts whether Moran has made any showing of prejudice beyond that which the statute of limitations is designed to control. *Mays*, 549 F.2d at 679-80. We find it unnecessary to reverse on this close question, however, because we find the district court clearly erred in applying the second prong of the test to this case.

Balancing the length of the delay with the reasons for the delay.

The district court found that the government's delay in re-indicting Moran was unjustified and excessive, and that the reasons offered for this delay were insufficient as to Counts II-XVII. In oral findings at the conclusion of the hearing on the dismissal motion, the district court stated:

> "I cannot make a finding and will not make a finding that the Government did this as a tactical maneuver in order to gain an advantage on the defendant, but I find that that was the effect, that is, it did gain an advantage upon the defendant by this delay."

The court concluded that the government should have reindicted on the original counts as soon as Victorson and Hale were returned to custody in 1981.

The district court characterized the government's delay in this case as "unjustified", but it never expressly found any fault on the part of the government. In fact, the only finding regarding culpability was the court's refusal to find an intentional delay. Although as established above, negligent governmental conduct may form a basis for unconstitutional pre-indictment delay, our cases clearly require some showing of governmental culpability to prove a deprivation of due process. *See e.g., United States v. Swacker,* 628 F.2d 1250, 1254 n.5 (9th Cir. 1980).

The record in this case is absent any evidence of culpability. Moran's bald assertions to the contrary are unavailing. The record shows that the 23 month delay between the reappearance of Victorson and Hale and the reindictment was caused by the government's investigation of new evidence and its decision to try all the counts in one trial.

In *Lovasco,* the Supreme Court held that prosecuting a defendant following investigative delay does not constitute a deprivation of due process, even if the defendant's "defense might have been somewhat prejudiced by the lapse of time." 431 U.S. at 796. The Court was reluctant to allow courts to substitute their judgment for the prosecutor's in the decision of when an indictment should issue. The Court noted that prosecutors are not under any duty to file charges as soon as probable cause exists, nor even as soon as the Government "has assembled sufficient evidence to prove guilt beyond a reasonable doubt." *Id.* at 792. This is especially so in cases where a criminal transaction involved more than one person or more than one illegal act, as in this case. *Id.* at 793.

Moran's right to speedy trial.

Moran asserts that in the alternative, the dismissal of the Counts II-XVII should be affirmed on the basis of a violation of his right to a speedy trial. This sixth amendment claim is raised for the first time on appeal, but our court may affirm a lower court decision on any ground presented in the record. *Compton v. Ide,* 732 F.2d 1429, 1433 (9th Cir. 1984). We decline Moran's invitation to affirm on this ground. We find *United States v. MacDonald,* 456 U.S. 1, 7 (1982) dispositive on the issue; the

speedy trial clause has no application where, as here, the government dismissed charges in good faith.

The dismissal of Counts II-XVII is therefore reversed and remanded to the district court.

MORAN'S APPEAL

Refusal to Dismiss Count I.

Count I of the indictment, which alleges Moran's involvement in a conspiracy to defraud the Internal Revenue Service, was the only new charge in the seventeen count indictment. Moran's main contention is that the government possessed all the facts necessary to indict him on this charge at the time Victorson and Hale returned to the United States in 1981, and that the government's alleged ongoing investigation was a sham. We reject these contentions. The record supports the government's assertion that it obtained new evidence in 1981 and thereafter. Count I charged a new crime with different elements than those charged previously. The district court's refusal to dismiss Count I for pre-indictment delay was not clearly erroneous. *See Tornabene,* 687 F.2d at 317; *Mays,* 459 F.2d at 679.

Evidence of the Helena Star Conspiracy.

Moran contends that despite the dismissal of Counts II-XVII, the court improperly allowed the prosecution to present evidence regarding the Helena Star case. Moran contends that he was prejudiced because the prosecution devoted a majority of its testimonial evidence to the Helena Star facts which led to jury confusion. The government maintains that the Helena Star conspiracy was integral background information for the jury to understand Moran's role in laundering money from Victorson, Hale, and Sawicki's drug smuggling activities.

We note that the court instructed the jury several times that the defendant was not charged with marihuana importation or distribution. Additionally, the court instructed the jury that they should consider the Helena Star testimony only as background, as it might

> bear upon the charge in the indictment that the defendant, David Allen Victorson, Eric A. Hale, and Lyle Sawicki conspired together to impede, impair, obstruct and defeat the lawful functions of the Internal Revenue Service.

The judge's limiting instructions safeguarded Moran from any prejudice. Additionally, testimony of the Helena Star incident was necessary background for the jury's full understanding of the defendant's activities in this case. *See United States v. O'Connor,* 737 F.2d 814 (9th Cir. 1984), *cert. denied,* 105 S.Ct. 1198 (1985).

Moran next contends that Count I of the indictment alleged more than one conspiracy, and that the evidence presented regarding the Helena Star incident was symptomatic of this duplicitious incident. Moran would view the allegations against him of money laundering and transfers of money through financial institutions abroad as totally separate from the transportation of narcotics by Victorson and the others. Moran argues that dismissal is warranted because the government alleged separate multiple conspiracies in a single indictment.

Separate acts at separate times should not be confused with separate conspiracies. The actions of Moran and his co-conspirators were designed to accomplish a single goal—to hide the source and amount of their drug smuggling gains from the I.R.S. In a supplemental instruction following a jury question, the court instructed the jury,

> In order for you to find the defendant guilty of the crime charged in the indictment, you must find that he was a member of the charged conspiracy from its beginning.

This instruction put the question of a single conspiracy before the jury.

The standard for determining the existence of a single conspiracy is

> "whether there was one overall agreement among the various parties to perform various functions in order to carry out the objectives of the conspiracy.

United States v. Jabarra, 618 F.2d 1319, 1327 (9th Cir.), *cert. denied*, 446 U.S. 987 (1980). Here, Count I fulfills this requirement by alleging an overall agreement among the parties to misstate and misrepresent income to the IRS, wherein Moran's function was to set up the laundering of funds to conceal from the IRS the identities of individuals who had realized income from unlawful importation and distribution of narcotics. The indictment, therefore, meets the *Jabarra* standard. We find no error.

Overt Acts in the State of Washington.

Moran contends that the government failed to prove that any members knowingly committed an overt act in furtherance of the conspiracy within the Western District of Washington. Moran cites *Grunewald v. United States*, 353 U.S. 391 (1957), for the proposition that perjured testimony before the grand jury in order to cover up an initial conspiracy cannot be considered as part of the original conspiracy. Five acts were performed within the Western District of Washington, including Moran's transfer of funds for purchase of a tug and barge intended for use for vessel to land transportation of the marijuana aboard the Halen (sic) Star, presentation of false documents, and Moran's perjury.

Although *Grunewald* does hold that perjury given to cover up an original conspiracy is not considered an overt act in furtherance of the original conspiracy, 353 U.S. at 401-406, the transfer of funds by Moran for the tug and barge provides in itself the required overt act in the Western District of Washington. The transfer fit within the indictment's allegations of concealing and legitimizing funds from illegal activities.

Sufficient Evidence to Establish Commission of the Crime Charged.

Moran contends that insufficient evidence against him was presented to establish his participation in the conspiracy. Moran's first contention is that under *U.S. v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 335 U.S. 924 (1958), and *United States v. Enstam*, 622 F.2d 857 (5th Cir. 1980) *cert. denied*, 450 U.S. 912 (1981), evidence must be presented not only that a defendant advocated non-disclosure of income, but also that governmental

functions were interfered with by deceit, craft or trickery. *Klein*, 247 F.2d at 916. In *Enstam*, the court relied on evidence showing fictitious deductions and misreporting of income. 622 F.2d at 860-63.

The record contains evidence that Moran advocated that Victorson, Hale and Lyle Sawicki pay income taxes only on funds labeled as consulting fees, a small portion of their smuggling proceeds. Testimony also revealed that the scheme of foreign and domestic corporations and bank accounts was created to "make it as confusing as possible to unravel in this case if the IRS ever had to unravel it." This evidence supplies a sufficient basis under the *Klein* and *Enstam* cases.

Moran additionally claims that under *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 2363 (1984), his first amendment rights were violated because he merely counseled his clients to pay taxes owed. We reject this contention. Moran's conduct "went far beyond advocacy and amounted to participation in unlawful action." *United States v. Little*, 753 F.2d 1420, 1434 (9th Cir. 1984) (as amended Feb. 15, 1985).

Finally, the court's instructions to the jury were clear. First, the jury was instructed that standing alone, there was nothing illegal about forming off-shore corporations in foreign countries, or in those corporations transferring funds into or out of the United States. The court also instructed:

> "if you find that defendant was providing legal advice to Victorson, Hale and Sawicki, that those persons then used that advice for illegal purposes without that illegal use being intended by the defendant then you must find him not guilty."

Moran's assertion of error due to insufficient evidence is rejected.

Admission of Records of Foreign Banks and Corporations.

Moran's next assertion of error stems from the admission of Exhibits 505 and 506. Exhibit 505 consists of a bank statement, deposit slip, and four letters signed by Moran pertaining to an account at the Barclay's International Bank branch at the Cay-

man Islands. Exhibit 506 consists of letters, corporate minutes, a bank signature card, and bank debit receipts pertaining to the corporations set up by Moran in the Cayman Islands. The bank manager and the assistant corporate agent each submitted signed statements certifying that documents of this type contained in each exhibit are kept in the ordinary course of business, and that these documents were so kept; their statements were admitted with the exhibits.

Moran asserts that the district court committed prejudicial error in admitting these exhibits without requiring their introduction by a custodian or other qualified witness under Fed. R. Evid. 803(6). Moran claims that the failure to have such a witness denied him his confrontation rights. The trial court's decision to admit evidence over hearsay objections is reviewed for abuse of discretion. *United States v. Burreson*, 643 F.2d 1344, 1349 (9th Cir.), *cert. denied*, 454 U.S. 847 (1981).

The district court considered the testimony of Hargreaves Rawstron, the registered beneficial owner of the various Cayman corporations, and Asst. U.S. Atty. Frush, who accompanied Rawstron to Cayman to gather the documents. The court considered each document separately, noted the confrontation problem and only admitted some of the offered documents. Defendant had an opportunity to cross-examine Mr. Frush over certain now objected to documents, but declined the opportunity.

We find that letters and deposit slips signed by Moran are admissible as admissions of a party opponent under Rule 801(d)(2)(A). *See, e.g., United States v. Matlock*, 415 U.S. 164, 172 (1974); *United States v. Tamura*, 694 F.2d 591, 597-98 (9th Cir. 1982). Since the out of court statements introduced through these documents were made by Moran himself, he can claim no confrontation clause violation. *See United States v. Rios-Ruiz*, 579 F.2d 670, 676-77 (1st Cir. 1978).

We need not reach the issue whether the remaining documents were admitted in error. Our review of the record indicates that evidence of Moran's guilt, independent of this evidence, "was manifest and overwhelming." *United States v. Martinez*, 536 F.2d 886, 889 (9th Cir.), *cert. denied*, 429 U.S. 907 (1976). The error,

if any, was harmless. *See id. Prejudice by Alleged Prosecutorial Misconduct.*

Moran asserts that the government's cross-examination of Moran and Urich (Moran's law partner) contained prejudicial accusations of unrelated prior bad acts made without a good faith basis. We note that Moran failed to object to most of these alleged errors at trial. Judge Voorhees admonished the jury to disregard the questions and any implications from them.

The district court's quick and straightforward instructions to the jury eliminated any potential prejudice to Moran. No reversible error is therefore shown under our circuit's standard for prosecutorial misconduct. *See United States v. Berry*, 627 F.2d 193, 196-99 (9th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

CONCLUSION

The district court's dismissal of sixteen counts based on pre-indictment delay (No. 83-3101) is REVERSED. Moran's conviction on Count I (No. 83-1295) is AFFIRMED.

APPENDIX B

United States Court of Appeals
For the Ninth Circuit

No. 83-1295
No. 83-3101
No. 85-3079

United States of America,
Plaintiff-Appellee,

vs.

Robert Leo Moran,
Defendant-Appellant.

United States of America,
Plaintiff-Appellant,

vs.

Robert Leo Moran,
Defendant-Appellee.

ORDER

Before: WRIGHT and TANG, Circuit Judges, and CROCKER,* District Judge.

I. *Petitions for Rehearing on Merits of Nos. 83-1295, 83-3101*

The panel as constituted above has voted to deny the petitions for rehearing in Nos. 83-1295 and 83-3101 filed May 17, 1985. Judge Tang votes to reject the suggestions for rehearing en banc. Judges Wright and Crocker recommend rejection of the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P.35(b).

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* Honorable Myron D. Crocker, Senior United States District Judge for the Northern District of California.

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

II. *Revocation of Bail—Petition for Rehearing*

A. Moran's submission of July 23, 1985, styled "Petition for Rehearing with Suggestion for Rehearing En Banc" from this court's order of July 15, 1985 revoking bail is construed as a motion for reconsideration and it is ordered filed as of July 23, 1985. Upon due consideration, the panel votes unanimously to deny reconsideration.

B. The suggestion for rehearing en banc included in the July 23rd filing need not be circulated to the full court, *see* United States Court of Appeals for the Ninth Circuit, general Order 6.9, and "[e]n banc hearings are ordered only on appeals or other proceedings on the merits . . ." *Krakoff v. United States,* 431 F.2d 847 (6th Cir. 1970). The suggestion for rehearing en banc is therefore rejected.

It is ordered that the Petition for Rehearing is denied and the Suggestion for Rehearing En Banc is rejected.

III. *Stay of Order Revoking Bail*

The panel has considered fully the arguments made in Moran's "Response to Government's Motion to Revoke Bail" filed August 5, 1985. The panel finds that Moran's arguments are without merit. The government's motion to revoke bail was properly before this court. *United States v. Perdomo,* Nos. 84-1357, 84-1024 (9th Cir. July 15, 1984).

Accordingly, it is hereby ORDERED that the stay of this court's bail revocation order of July 15, 1985 is vacated this date.

IV. *Appeal No. 85-3979*

The appeal in *United States v. Moran,* No. 85-3079 is the government's appeal of the district court's denial of the motion to revoke bail. The correct procedure was utilized by the government under Fed. R. App. P. 9 in its Motion to Revoke Bail filed July 10, 1985. *Perdomo,* slip op. at p.4. Accordingly, the issues

resolved in this order render No. 85-3079 moot and appeal No. 85-3079 is ordered dismissed.

APPENDIX C

In the United States District Court
Western District of Washington at Seattle

No. CR 78-123V

United States of America,
Plaintiff,
v.
Robert Leo Moran,
Defendant.

ORDER RE:
MOTION TO DISMISS

The Court, having reviewed and considered all of the files, records, exhibits, declarations, and pleadings in this matter; having heard oral argument on this subject on July 14, 1983 pursuant to the Defendant's Motion to Dismiss for Pre-Indictment Delay; does hereby find, in the exercise of its' sound discretion, as follows:

1. That the Defendant, ROBERT LEO MORAN, has suffered "actual" prejudice by virtue of the government's delay in bringing this matter to trial;

2. That said prejudice consisted of the verifiable inability of the defendant to present witnesses or witness testimony previously available to him in September of 1980 (and subsequently). The witnesses' testimony is detailed in the Defendant's Moving and Reply papers;

3. That said actual prejudice was the direct result of the government's delay in this case, which delay was unjustified and excessive; and

4. That the reasons offered by the government for the excessive and unjustified delay were not sufficient as to Counts II through XVII inclusive and pursuant to the holdings of *United States v. Lovasco* (1977) 431 US 783, 52 L.Ed.2d 752, 97 S.Ct.2044 and *United States v. Mays* (9th Cir. 1977) 549 Fed.2d 670, the defendant has been deprived of due process as guaranteed by the Fifth Amendment to the United States Constitution.

WHEREFORE, there being good cause, it is HEREBY ORDERED that Counts II through XVII of the present Indictment be and the same are hereby dismissed.

It is so ordered.

Date: August 22, 1983

DONALD S. VOORHEES
United States District Court Judge

Presented by:

DANIEL HOYT SMITH
Attorney for Defendant

APPENDIX D

In the United States District Court
For the Western District of Washington
At Seattle

No. CR78-123V

United States of America,
Plaintiff,

vs.

Robert Leo Moran,
Defendant.

TRANSCRIPT OF PROCEEDINGS in the above-entitled and numbered cause, heard before the Honorable Donald S. Voorhees, Judge of the United States District Court, commencing at 1:30 o'clock p.m., July 14, 1983. He proceeded, and that was on money laundering and counseling and advising. Exactly the same thing that's in the first count now.

Your Honor, I say most respectfully that to dismiss all but the first count is just a gross injustice because you're subjecting the man to exactly the same thing that he was before, and you're allowing the Government really to play a game, and I hope you don't see it that way.

Thank you.

THE COURT: All right. Well, despite what you have said, Mr. Morgan, that is what I'm going to do. We don't have here, it seems to me, really preindictment delay. What we have here is a combination of post-indictment and preindictment delay, because Mr. Moran was indicted before, and much went on before that, that is, before September, 1980. Then it was dismissed, so the delay following that dismissal is really delay following an indictment, and I think the defendant here has shown prejudice to him because of this delay. Loss of certain witnesses; loss of certain testimony.

I cannot make a finding and will not make a finding that the Government did this as a tactical maneuver in order to gain an

advantage on the defendant, but I find that that was the effect, that is, it did gain an advantage upon the defendant by this delay.

I feel what the government should have done was as soon as Victorson and Hale were in custody, then go ahead and indict—reindict on the original indictment because the government said it was prepared to go to trial on that original indictment, and tried it. Then if they had developed additional information covered by the new Count I of the new indictment, then have another trial.

Now, with respect to the possible duplication of Count I, I would hear a motion to strike certain—I'm not saying I would strike any portion of it, but of course you could move against certain paragraphs if you feel that those particular paragraphs are prejudicial to the defendant.

MR. MORGAN: Can I just add one thing, Your Honor, before Your Honor makes a decision. Our defense is the same. That's the problem.

THE COURT: Well, I've made my ruling and I'm going to stick with that ruling.

MR. MORGAN: But our defense is the same, Your Honor, and if we're prejudiced in the other seventeen, we're just as prejudiced in that first one. There is no difference, Your Honor, and I would hope that you would reconsider that because the same witnesses are lost. The witnesses—the money laundering was always the factor, and now they've just put it in a different label, Your Honor.

THE COURT: I don't think that's true. I think that Count I does charge an entirely different crime with different elements.

So that will be my ruling, that Counts II through XVII will be dismissed. Count I will not be dismissed. It's a close question, because as Mr. Schroeder pointed out, generally what you look at is the statute of limitations. If there had not been prior indictments here, that's what I would have looked to and say this indictment is perfectly all right; we'll go to trial on it. But because of the prior indictment and the fact that I dismissed the prior indictment, the fact that the Government said it was ready to go

to trial in September, 1980, the fact that Victorson and Hale were available in April of 1981, makes me make the ruling that I have made.

Now, I guess the next motion is motion for change of venue. May I hear from you?